Central Law Journal

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THE AUTOMOBILE CASUALTY LIST

Has it come home to you, this slaughter of men, women and children by automobiles? Have you killed or maimed anyone? Has someone near to you been maimed or killed by an automobile? If not, what assurance have you that it will not happen today or tomorrow? It is inevitable that a certain number of our people will be killed between now and the first of the coming year. Insurance men can tell you almost exactly the number. No one who goes upon the public highways is exempt. The babe in arms and decrepit old age are alike exposed to this danger—this unneces sary evil.

Are we, who declare so vehemently against war and its horrors, going to sit idly while the slaughter goes on? Yes, largely so. We may do something in a half-hearted way, but not much. A few of us may make, even are now making, real effort to lessen this crime, but not enough of us are on the job. The situation is not brought to us as a whole. We are not sufficiently aroused by hearing or reading of the death of a person in our own locality every day or two. If a city of 8,000 persons were wiped out at one stroke, we might be aroused sufficiently to take some action, but that number killed in the United States over a period of ten or eleven months does not suffice.

Thus far this year, in the United States, more than 8,000 deaths have been caused by automobiles. On November 18, St. Louis recorded her one hundred and twenty-first death by automobile for this year. An average of one for a little less than every three days. It is a little startling to know that between November 18 and next New Year's Day, fourteen persons will be killed by automobiles in St. Louis. This number will be found to be almost exact, and the fate of these unfortunates is inevitable. On the same day last year St. Louis had only 86 fatalities from this source.

In New York City 800 people have been killed thus far this year as a result of automobile accidents. Washington, D. C., reports more than 5,000 automobile accidents this year, from which 50 deaths have occurred.

In Los Angeles and Chicago conditions are worse than in most cities. In the former this year there have been 211 killed and 4,449 injured in 23,350 automobile accidents. In the latter, during the first nine months of this year there were 7,768 automobile accidents, with a loss of life throughout Ilinois of more than 800.

The State of Ohio records 8,871 injured, and 617 killed in automobile accidents this year. Cleveland reports 111 deaths, Seattle 41, San Francisco 103, Boston 102, Pittsburgh 150, Detroit 156. Philadelphia reports 190 deaths, compared with last year's total of the same number.

The folowing is a statement made by Chief City Magistrate McAdoo, of New York, given the United News:

"We are confronted with a situation of danger which is at once acute and requires immediate attention. Of all questions confronting the public this one of regulating vehicular traffic is paramount because it involves not only life and limb, but the public convenience.

"The present slaughter must be stopped and this cannot wait for any physical improvement in New York City. The plans in contemplation to relieve the congestion would take two years to complete. Manhattan is not made of rubber and cannot be stretched, and the number of vehicles and pedestrians is increasing by the hundreds of thousands annually.

"A radical change must be made in the whole status of the licensing machines. We don't want a revenue producer at Albany; we want a life saver.

"Most important of all, put at least 1,500 policemen on dangerous crossings. There is no substitute for the individual police-

man. Most of the killing of children by automobiles has been at crossings without police protection.

"There are now 20,000 taxicabs and sight-seeing vehicles alone licensed in New York. There is no limit to the number that can be licensed, and the board of aldermen has the right to limit the number of licenses and this is what should be done."

NOTES OF IMPORTANT DECISIONS

ADMISSIBILITY OF EVIDENCE OF OTHER OFFENSES BY ACCUSED.—The case of Com. v. Bemis, 136 N. E. 597 decided by the Supreme Judicial Court of Massachusetts, held that in an action for carnal knowledge and abuse of a female child evidence of other similar acts with the complaining witness at a period not too remote was admissible for the following reasons, as stated in the opinion:

"Subject to the exception of the defendant, Ida E. Clifford testified that in August, 1920, after she had attained the age of sixteen years, the defendant came to her bedroom and there had sexual intercourse with her. In support of this exception the defendant relies upon the general rule that evidence of a distinct crime unconnected with that laid in the indictment cannot be given in evidence (Commonwealth v. Feci, 235 Mass., 562, 567, 127 N. E. 602). The rule of criminal evidence involved is, however, subject to many exceptions (Commonwealth v. Choate, 105 Mass., 451; Same v. Bradford, 126 Mass., 42; Same v. Robinson, 146 Mass., 571, 16 N. E. 452; Same v. Snell, 189 Mass., 12, 75 N. E. 75, 3 L. R. A., N. S., 1019; Moore v. United States, 150 U. S. 57, 14 Sup. Ct. 26, 37 L. Ed., 996; People, &c. v. Molineaux, 168 N. Y., 264, 61 N. E. 286, 62 L. R. A., 193). One of the recognized exceptions invariably followed in this commonwealth is that when a defendant is charged with any form of illicit sexual intercourse evidence of the commission of similar crimes by the same parties, though committed in another place, if not too remote in time, is competent to prove an inclination to commit the act charged in the indictment (Commonwealth v. Nichols, 114 Mass., 285, 19 Am. Rep. 346) and is relevant to show the probable existence of the same passion or emotion at the time in issue (Sullivan v. Hurley, 147 Mass., 387, 18 N. E., 3; Negus v. Foote, 228 Mass., 375, 117 N. E., 351). The judge correctly instructed the jury in respect to the limited use it was permitted to make of the testimony excepted to and thereby fully conserved the rights of the defendant."

LANDLORD'S LIABILITY FOR INJURY TO TENANT DUE TO LATENT DEFECT IN PREMISES.—In the case of Stumpf v. Leland, 136 N. E. 399, the plaintiff, a tenant of a private dwelling house owned by the defendant, was injured due to a hidden defect in the porch. The Supreme Judicial Court of Massachusetts held that, there having been no knowledge upon the part of the defendant as to the defect, he could not be held liable for the injuries to plaintiff.

We quote from the opinion of the Court by Mr. Chief Justice Rugg:

"The tenant takes the premises as he finds them and assumes the risk of their quality in the absence of an express warranty or deceit. There is no presumption that they are in good repair or fit for occupancy. There is no duty implied from the relation of landlord and tenant that the former will keep the premises in a safe condition during occupancy by the latter, or in the same condition in which they were or appeared to be at the beginning of the tenancy. In general the tenant cannot recover against his landlord for personal injuries caused by the defective condition of the premises let unless the landlord agrees to repair, make the repairs and is negligent in making them (Conahan v. Fisher, 233 Mass., 234, 238, 239, 124 N. E., 13, and cases there collected; Wallquist v. Rogers, 237 Mass., 83, 129 N. E. 417). One qualification of this general rule is that if the landlord knows of some hidden defect in the demised premises of which the tenant is ignorant, then the obligation rests on the landlord to give notice thereof to the tenant, and for injuries arising from such failure of duty may be held liable in damages. This obligation does not exist in the absence of knowledge on the part of the landlord. It does not impose a duty of inspection in order to find defects and consequent liability for negligent performance of such inspection."

In Mansell v. Hands (235 Mass., 253, at p. 255, 126 N. E., 321, 13 A. L. R., 835) it was said:

"If the defendant did not know of any concealed defect or conditions which might make the use of the premises dangerous, no liability has been shown, and the verdicts were ordered 'rightly' in favor of the defendant."

MOTORIST GUILTY OF MURDER IN RUNNING DOWN PEDESTRIAN.—In the case of Montgomery v. State, 190 N. W. 105, decided by the Supreme Court of Wisconsin, the Court holds that the driving of a large automobile at high speed down a much-traveled track by a standing street car without any regard for the presence of persons about to board the car was an act imminently dangerous to others evincing "depravity of mind", within the meaning of St. 1921, § 4339, defining second degree murder; such degree of murder being the absence of a premeditated design to take the life of another.

Commenting on the evidence, the Court in part said:

"It would be difficult to find in all that has been written upon the subject of homicide, as large as the mass of material is, a case which more distinctly illustrates every essential element of the crime of murder in the second degree than the case at bar. Nothing is wanting here to make the offense murder in the first degree but the element of premediated design, which element is usually set forth in the information and indictment by the apt use of the words 'wilfully and of malice aforethought'.

"We do not know what extenuating circumstances, if any, there were in the conduct of the defendant. Certainly there is nothing in the record which in any way excuses or mitigates the heinousness of his offense. A group of innocent women and children, upon a public street, in a place where they were lawfully entitled to be, were run down and three of them killed, under circumstances which afford no excuse or justification. The defendant was charged with murder in the second degree, and every element of that offense is clearly and indisputably established."

MOTORIST MAY USE LEFT SIDE OF ROAD TO REPAIR CAR.—The Supreme Court of Wisconsin, in Schacht v. Quick, 190 N. W. 87, lays down the rule that a traveler has the right to make reasonable use of the highway for examination or repairs of his automobile while traveling, and he may use the left-hand side of the road, if he does not thereby unreasonably interfere with others.

There was judgment for the defendant in this case, which the Court reversed because of refusal of the trial court to give a proper instruction to the effect that the plaintiff's deceased was not negligent in stopping on the left side of the road. The Court recites the facts as follows:

"In the present case the evidence showed that the roadway was graveled for a width of about 16 feet; that the deceased stopped near the left-hand edge of the graveled portion, thus leaving from 8 to 10 feet in width of graveled road on the right for the defendant to pass on. This is admitted by the defendant. He had therefore ample space in which to safely pass the deceased. The evidence shows that he saw him for a considerable distance before the collision; that he turned his car far enough to the right to come in contact with the softer edge of the gravel, and then turned left diagonally and struck the deceased. He claims the deceased stepped back two or three feet just before the impact, but it is almost a verity in the case that the left front hub of defendant's car struck the front fender of the standing car. At least the spokes of the wheel were snapped off and the fender shows the result of a serious impact from some solid substance. Under such circumstances it does not seem likely that deceased was struck because he stepped back, if he did step back, and the jury probably found him negligent because he stopped on the left-hand side of the road or because he did not enter a private road, neither of which, under the circumstances of this case, constituted negligence. The Court was requested to so charge, but it did not."

AGRICULTURE AND THE LAW

By J. G. Mitchell

It is probably that "mad Kentish priest", John Ball, as he was styled by some of his English contemporaries of the fourteenth century who condensed into a couplet the sociology of the first agricultural enterprise:

"When Adam delved and Eve span,
Who was then the gentleman?"

And startled them not so much with the idea of the simplicity of original social and economic relations as by the revolutionary implications contained in the conundrum. And while the literary critic might suggest that Eve's spinning activities would be somewhat restricted by the physical limitations of fig leaves, one is irresistably drawn to the further consideration that agricultural relations to the law were as little complicated as were their social and economic. And the sacred story itself amply supports this view. One ordinance was sufficient to hold this society together. But it is not the function of this paper to follow the gradations of society and its correspondingly increasing complexity. It will be sufficient to observe that from an origin resting in simplicity itself the agricultural industry has developed until there is no occupation that has a larger number of legal contacts.

Those who have viewed the farmer merely as a producer will find it difficult to agree with this proposition. In that view he is first a land holder and the rules applicable to his title and tenure differ little, if at all, from those which operate upon the holder of business or residential real estate in the city. He may be concerned upon such questions as the erection and maintenance of partition fences, the drainage of surface waters, and the protection of his crops from the invasion of noxious

weeds to a degree that would be puzzling to the uninitiated city dweller, but the latter, if he adorns a legislative chamber is willing to humor certain amusing, but harmless, whims and fancies. And if he demands that some statute be enacted for the protection of his live stock from infectious or contagious disease, it usually dawns upon the same statesman that his interests are to a limited degree mutual, since a diet consisting even in part of diseased animals or tubercular milk is not wholly inviting. He is even willing to go the length of voting an appropriation for such purposes, if there is no other way of meeting the situation.

But even in this realm of the essentially productive the average legislator is disposed to moderate his generosity. He frequently develops an astonishing alarm at the suggestion that the farmer should be allowed to treat his stock, and sometimes the tribute of admiration, which this dramatic expression of fierce altruism invokes, is tempered by the suspicion that it is measurably inspired by a sympathy for the veterinarian or serum manufacturer, or both.

For two years an Iowa statute, for all practical purposes, made the disposition of a dead animal (no matter what the cause of death), except to the odoriferous owner of a rendering plant, a crime. As an opportunity for petty blackmail it was hard to excel. Any attempt to disclose the insidious efforts of multifarious interests through the medium of the legislature to impose additional burdens upon the farmer would require a volume, and the editor has already cautioned the present writer against submitting a book.

The phases of the law in which agriculture has interested itself during the past few years, and those which have engaged the attention of other interests are primarily economic. Space limitations will permit only the hastiest presentation of one or two of the most important adventures in this direction. The farmer discusses these adventures under the generic term "Co-operation". His lack of comprehension of all that this idea connotes may be excused when it is recalled that some months ago, and for the readers of the Atlantic Monthly (which, I should explain, is a magazine published in Boston) a New York lawyer of some note attempted very inadequately to portray a horrible nightmare from which he had been suffering. He described it, with a literary inexactitude which should be attributed to the mental anguish it had caused, as a "co-operative trust". Such a conjunction of antagonistic ideas is as entertaining as a Chinese explanation of a lunar eclipse—and as edifying. And he has been singularly out of touch with current happenings, who has not been the victim of similar and varied declamations to the same purpose.

It is almost a startling fact that the farmer whose traditions are so strikingly individualistic should undertake to conduct the commercial side of his business upon the co-operative principle. The explanation of that phenomenon is not fully comprehended by the consideration that its financial benefits are proportioned to the volume of business which the respective individual does with the association. His approach has been determined rather by the very necessities of his case. Co-operation appeared to be the one possible solution of his problem. The current fallacy is that the farmer has no problem in fact, and examples of men who have acquired competencies are offered in evidence of this view. It may be conceded that fortunes have been made through the increase in land values, but land speculation is not farming, and if we may indulge a colloquialism "Them days are gone forever." The problem before the farmer is how he shall maintain himself and his family in such a manner as will enable him to conform to his environmental standards *through the business of farming.* And —parenthetically—this is a problem that

is of vital importance to every member of the social family, for upon its solution hangs the future of our civilization.

The farmer has approached his problem in a variety of moods. Rightly or wrongly the idea that he is the only producer whose prices for the things he buys and the things he sells are fixed without regard to his opinion of the value of the former or the cost of producing the latter, has become an obsession. But he has long since learned that indignation of itself can accomplish nothing. In an effort to correct these evils he has joined forces with others in the enactment of legislation directed against "Monopolies" and "Trusts", "Pools" and "Combinations", and in its passage he has attempted to exempt himself from its operation by specific exceptions. If the general inefficacy of these laws has not been sufficiently demonstrated to him by the striking resemblance which the prices of staple necessities bear to one another under a variety of conditions, the Courts have left him without argument concerning his attempt to exempt himself from their operation.

The leading case of Connolly v. Union Sewer Pipe Co., 184 U. S. 540, effectively disposed of this means of obtaining the desired privilege. The Court held that the Illinois statute was contrary to the provisions of the Fourteenth Amendment. While its discussion is somewhat academic, it may be remarked that an able dissenting opinion was offered by Mr. Justice McKenna. The facts upon which this legal question was submitted to the Court are also significant. Connolly was attempting to defeat an honest obligation, and to shelter himself behind the provisions of the Illinois law that any corporation violating its provisions should be disabled from maintaining an action upon its contracts. The Supreme Court was faced with the alternatives of relieving Connolly, or declaring the whole law unconstitutional. It chose the latter, and while the consideration suggested may have had no influence upon the decision, it is significant that in a case vitally affecting the nation's most important industry the principal party in interest entered no appearance. And it may as well be frankly confessed that many disabilities under which agriculture is laboring are occasioned by this neglect.

With a fine disregard of the well-established principle that class legislation may or may not offend the constitution almost every proposed enactment for the benefit of agriculture is denounced as iniquitous.

The farmer has learned more quickly than others that special privilege has a double element of danger. Not only is it subject to more or less successful judicial attack, but its reaction against its intended beneficiary is of its very nature. In the long run he invariably becomes its victim. He has therefore been compelled, in order to secure, not superior, but equal, advantages in the field of economics, to prepare his measures not from the standpoint of a class, but from that of a method of doing business. He conceives it to be morally right, and socially safe, that those doing business upon the co-operative basis, which contemplates the benefit of the large majority rather than the maintenance and extension of privilege to the few, shall be permitted to enter into contracts which have been banned by the various anti-trust laws and the judicial decisions applying them. He has therefore designed his legislation to include manufacturing, mining, mercantile, mechanical, as well as agricultural enterprises, and is willing that the right to bargain collectively shall be extended to all individuals or associations organized upon the co-operative plan. The privilege is to be extended, not to a class, but to a form of commercial organization.

As a consequence of this reasoning there has been introduced into the corporate law of some States a form of organization which has three esesntial features: First: An absence of capital stock; Second: That it shall not be for pecuniary profit, and, Third: That the organization shall

operate for the mutual benefit of its members. And he has then sought by other legislation the privilege of making such contracts between the association and its members as shall insure their loyalty and its existence.

Simplicity is the charactertistic of the child—and this is due to lack of information. In some respects we shall always remain children, and those who ought to know better—and do—are perpetually frightening us with the goblins that will get us—"if we don't watch out". The latest takes the form of a gigantic combine of producers that will control food and food prices—a "co-operative trust"—and issue to the world the terrible ukase—*"Pay or Starve."* No one who has the slightest conception of the diversification of food production—from the standpoint of geography and variety—and of the hopelessly irreconcilable interests of those engaged in the industry, perceives in these wild imaginings any element of danger or good sense. As well attempt to master the ocean by a scheme of damming the rivers.

No attempt is made to treat exhaustively any phase of the subject which we have had the temerity to consider. In his legislative groping the farmer is doubtless impelled by considerations somewhat similar to those that inspired John Ball. He asks a fair share of the things he produces and their economic equivalents, and a sympathetic examination of his case, for it is one in which the parties in interest include every member of society.

A woman, blessed with a masterful disposition and considerable personal property, died, leaving behind her a will in which her husband was cut off with a dollar, on the ground that he had deserted her a year before. The lawyer finally located the man and broke the news gently by telling him that he had received only a small bequest. "How much?" carelessly asked the man. "One dollar." With the same carelessness, the man turned toward the door. Just as he reached it, however, a sudden thought struck him. "Say", he called back anxiously, "did she specify what I was to do with this dollar?"—Wire and Pipe.

STAMP TAX ON SHARES OF NO PAR VALUE

By Lewis Hopkins Rogers, Esq., of the New York Bar

Francis Lynde Stetson had a wonderful conception when he startled corporation attorneys, some years since, by suggesting the issuance of stock having no par value.

Admittedly fictitious, the figures printed in the corner of a certificate of stock, by custom, seemed a most essential part of a corporate scheme.

New York was the first State to recognize the depth of the idea, and now almost every State in the Union, under varying regulations, provides for organizations, *sans* the value of each share printed thereon, determined by the promoters, directors or printers prior to the establishment of value therefor in any other manner.

For taxing purposes (and the tax man must have his say) the value was fixed at $100 per share. Under the evolution of this no par value idea, the taxing value of this corporate infant has run the chromatic scale to lower tones, and the corporation attorneys may now choose from many States and select a chord which will harmonize with the project.

Now comes federal requirement—the value of stamps required on original issue of no par value stock.

A little dry reading is necessary before the argument, to-wit: Quoting from "Regulations 40, 1922 Edition", issued by the Treasury Department, United States Internal Revenue, Article 2, subdivision (b): "All certificates of stock, or of profits or of interest in property or accumulations issued by any corporation, without par or face value, are subject to the tax of 5 cents per share unless the actual values in excess of $100 per share, in which case the tax shall be 5 cents on each $100 of actual value or fraction thereof, or unless the actual value is less than $100 per share, in which case the tax shall be 1 cent

on each $20 of actual value or fraction thereof."

Let us assume that "actual value" may be easiest and best determined by the sales price of shares. A corporation is formed with stock of no par value and the product back of the enterprise is of such merit that the stock is immediately sold for $200 per share.

A sales memorandum on ten shares would be: "Ten shares A. B. Co. at $200 —$2,000.

The tax now changes from *per share* to "actual value", the words used by the Federal Government. The 5c is applied and usable only on a *per share* tax, provided the shares are of a certain value ($100). "Actual value" is therefore determined by the number of shares multiplied by the price of each share.

It seems that if the language used had been "*certificate value*" and "*share value*" there would be no controversy which now exists.

Let us assume a corporation with an enterprise of a doubtful value desiring to sell its stock of no par value at a nominal price of 20 cents per share. A sale memorandum of 10,000 shares would look as follows: "10,000 shares of X. Y. Co. at 20 cents— $2,000."

Referring to the "dry reading" above, last clause, "or unless the actual value is less than $100 per share, in which case the tax shall be 1 cents on each $20 of actual value or fraction thereof."

If the same rule is applied to determine what "actual value" means in this case as in the former, it is by multiplying the number of shares by the sales price.

The stamp tax on the A. B. Company—Ten shares at $200, $2,000—is undoubtedly $1 whether it be figured at 10 cents per share or dividing 2,000 by 100, reducing it to a figure of twenty shares (for computing the tax) and then using the quite flighty constant of 5 cents (per share).

Now, what is the Federal Government demanding as a tax on the 10,000 shares sold by the X. Y. Company?

If the reading of the last clause cited above—"1 cent on each $20 of *actual value* or fraction thereof"—refers to the actual value of the *shares,* the tax would then be $100, for the actual value of each share would be taxed 1 cent—10,000 shares times 1 cent equals $100.

Of course this cannot be true, and yet there is rumor of a government opinion that the interpretation placed on this clause will be on the *share* value, and to back up this opinion reference is made to subdivision (d), Article III, of the same official document, which is not such dry reading after all: "In case of stock without par or face value the actual value of the stock is to be determined by the market price of each share."

The A. B. Company sells $2,000 of no par value stock and pays the government a tax of $1.

The X. Y. Company sells $2,000 of no par value stock and pays the government a tax of $100.

A large number of companies are organizing with no par value stock which is being placed on the market at varying prices. Twenty dollars per share is a very high price per share for initial offering. Every corporation has the inherent right to sell its securities at a price determined by its board of directors. This is granted in the charter.

Shall the corporation selling its stock at 20 cents pay a government stamp tax one hundred times as large as the corporation selling its stock at $20?

It is no answer to state that "no par value" stock should not be sold at 20 cents. It may be done, and is being done today.

The question is one of unjust discrimination, assuming those wise in federal ways intend to interpret "actual value" in one instance as *certificate* value and in another as *share* value.—New York Law Journal.

ARE YOU DOING YOUR PART TO HELP THE PROFESSION ALONG?

By Edwin C. Carr, Houston, Texas

The law is a jealous mistress and to the layman, a very mysterious individual and works in dubious ways.

The law jealously works out her vengeance on the lawyer who does not keep his oath and is unfair to courts and jury, but the punishment and contempt for the unscrupulous and curbstone lawyer is not only visited upon them, but their calumny and taints throw shadows not only upon the honorable men in the profession, but hold our laws, our courts, and juries under suspicion and in some localities in contempt. This is really the birthplace of lynch law.

Every lawyer knows and has heard on many occasions that a layman cannot have a fair and impartial trial or a fair deal (obtain justice) in our courts and every lawyer knows and should feel that this statement is untrue, although there have been occurrences on the part of honorable lawyers, courts and juries that cannot be pointed to with pride and give the litigant and public in general a precedent upon which to base their unjust opinion.

Can anything be done in the premises to retard the growth of such ideas or cause the public to hold our profession in well regard.

It shall be the purpose of this and the following articles to give a few observations as to why this opinion is more or less prevalent and a few sugestions as to how they may be overcome or at least ameliorated.

There are several good works by eminent authors on the relation of attorney and client, to say nothing of the innumerable cases handed down by our courts of last resort. Although we have all these before use, yet, very little is done by the bar in general to alleviate the situation. A great benefit is being done, however, by our several State Bar Associations and our National Bar Association, but the members of the bar in general must help in the work as well as set an example and not go upon the theory "let George do it".

A few days ago a local court ruled adversely upon a demurrer to a complaint against a mutual labor insurance association. The plaintiff tried to show in his pleading a total permanent injury. When the Court ruled on the demurrer, the attorneys were standing near the judge's bench and the plaintiff could not hear the remarks of the Court nor those of counsel and when he found out that he had no case, he left the court room and told his friends that the defendant had paid his own lawyer and the Court money to defeat him. The innocent acts of Court and counsel although seen but not understood by the plaintiff, were used as a fuel to a flame of hatred and prejudice of our courts and attorneys in general. In other words, litigants want to know, hear, see and understand everything transpiring in their presence. Etiquette of the court room forbids counsel to stand against the bench or to lean thereon and thereby show familiarity. And it is a better practice for lawyers to have their cases at issue before the time set for trial and in this way avoid a lot of unnecessary embarrassments. The litigant comes into court more or less awed and the least act is misinterpreted in favor of his jealousies. Even demeanor of courts and attorneys must be looked to with a critical eye on the part of the bench and obeyed by the bar.

If counsel would come out and tell his client the bald-faced facts as to the status of his case and not try to evade the true status under subterfuges it would help very much.

I have a case in mind where a busy lawyer had a case in court for a man who had inquired many times about how his case stood, and the lawyer, using an old and worn out stall of most lawyers "that the Court was busy and that there were several cases ahead of his and just as soon as

it came his turn the case would be tried", when in truth and in fact the attorney had had the case passed for the term several times on his own motion because he was afraid he would not win the case. This habit is started among the young practitioners and if not corrected early will soon become an obsession; by all means shun this habit as you would fire.

Another instance which brings much grief both to attorney and client is the fact that many attorneys after they have obtained money for their client either on a judgment or a demand collection, is failing to keep his fees and his client's money separated and paying it to whom due at the earliest opportunity instead of using it in his own business or some ulterior enterprice. The client is entitled to his money as soon as obtained by the lawyer and there can be no legitimate excuse for witholding it unless restrained by due process of law, such as by garnishment and attachment proceedings, or of money that lawfully belongs to a receiver.

This happens more frequently among those advocates who are unable to finance their way in the profession more than among others, although the gambling instinct among many claim its victims. Akin to this is a banker or stock broker who are entrusted with funds for safe keeping and use it in stock speculations and other Wallingford enterprises. Its products are embezzlers, convicts, asylum inmates, wrecked homes, confidences shattered and lost friends. If you are true to your oath and keep it inviolate, you shall be false to no one.

If an attorney has a prospective client with an annual retainer in view, dependable on his handling of the first case, he should do all in his power to state the law as it is upon the facts as presented to him by his client. He will advise him honestly and faithfully, let the chips fall where they may, for if you advise him so as to please him on the particular case and he goes into court and loses out, you are bound to receive the blame. But if you advise honestly and truly, and he is dissatisfied and goes elsewhere, and then goes into court and loses out, he is sure to come back and you have his business in the future assured. This is the only advertisement that a lawyer can honestly have and that is being true to his mistress, the law.

It is also a popular belief that lawyers invent subterfuges and false testimony to win cases. Incidents are few of this kind, although many lawyers are prone to tell their clients that he shall have to have a witness or witnesses to testify to a certain state of facts and the unscrupulous client brings those witnesses forth, and the lawyer is or was unwittingly the cause of it. Always interview the witnesses in person where possible or know what they will testify about without letting the client know what testimony that you have to have to make a case, for even witnesses are at times prone to go out of the way to get false testimony to help an honest litigant win a case. You are then in a position to know as to whether or not your client has a just cause of action for defense.

If you feel that your client has a cause of action, but cannot prove it, try to effect a settlement, but if on the other hand you represent the defendant and you are confident that he is right, but cannot prove a defense, then in such a case try and effect a compromise. If you go into court with defeat staring you in the face, the outcome will be a judgment and verdict for the opposition, carrying with it costs, time and humiliation. A good compromise effected is a cause won and always reflects wisdom upon the part of counsel.

Many clients have briefs and want them aired out in court so as to have them settled for all time. Nursing their wrongs keep them warm and when they find out after many days in court at heavy expense, which could have been avoided through fairness and hard work on part of the attorney, that he really had no cause of action nor defense to start with, beware of his

wrath. When this occurs, it works to the detriment of employed counsel and reflects upon the bar in general. So afterward when you advise a client truly, that he has a cause of action or defense, you are not believed and justly so. This taint will follow you through your whole life in the profession and if you take up another avocation, it will appear as a nightmare to torment you in your dealings with your fellow man. You cannot live it down.

And in all cases in which the State is a party seeking conviction of the defendant, and you represent the defense and feel that your client is guilty and he admits it, but is seeking clemency which is denied, all that can be expected of you is to see that he gets a fair and impartial trial and is convicted according to law. No State should be represented by counsel who seeks conviction, regardless of the fact as to whether or not the defendant is guilty or not. The prosecutor that can stand up before a Court and jury and honestly say that he believes the testimony in the case shows that the defendant is innocent when there is a public hue and cry for his liberty and life, is of the kind that heroes are made. It is the policy of our laws in America that no innocent man should suffer. It is to protect society from the law-breakers that our police officials are for and not persecution and prosecution. It should be as much their ambition to see that the law is not violated as to arrest the culprit after the deed has been committed.

The prosecutor is at times prone to let the police departments control to a large extent his cases in the justices' and municipal courts. Nine cases out of ten, where a policeman makes an arrest, he endeavors to make a conviction whether right or wrong (for his record's sake). The writer has seen many inocent laymen convicted who were beyond doubt innocent. The police officers used all the tricks of their trade and subterfuges to fool the Court and counsel and successfully did so. These happen to be petty cases and most of the defendants poor and the acts brand them as law violators and the next step is easy for them. This causes misery and distress in their homes and in many cases causes the breaking of family ties. The defendant goes forth among his family, his friends and his acquaintances and gives the court the opprobium of a "Kangaroo Court" with other like epithets, detriment to society, which is worse than the crime for which he was unjustly convicted.

Remember this, that the Bench and Bar shape the destiny of our Nation, and it behooves us to do our best to make it the best. We shape our laws, our customs, and standard of citizenship.

Alexander Hamilton was a lawyer, so was John Marshall, Daniel Webster, Patrick Henry and Abraham Lincoln. Who in the annals of our history can claim more glory than they? If we can but creep in their shadow, we should feel well compensated.

In my next article I shall outline and discuss a lawyer's fees, his retainers, and how to protect himself in that regard.

CONSTITUTIONAL LAW—FEDERAL LABOR BOARD

PENNSYLVANIA R. CO. v. UNITED STATES RAILROAD LABOR BOARD

282 Fed. 693.

District Court of Illinois, May 4, 1923

Transportation Act 1920, tit. 3, authorizing the Labor Board to ascertain just and reasonable wages and working conditions, is within the power of Congress under its power to regulate interstate commerce, and does not violate the right of private contract, or take property without due process of law, in violation of Const. Amend. 5.

Timothy J. Scofield, of Chicago, Ill. (Frank J. Loesch, Charles F. Loesch, and R. W. Richards, all of Chicago, Ill., and C. B. Heiserman and E. H. Seneff, both of Pittsburgh, Pa., on the brief), for plaintiff.

Blackburn, Esterline, Sp. Asst. Atty. Gen. (Charles F. Clyne, U. S. Atty., and Edwin L. Weisl, Asst. U. S. Atty., both of Chicago, Ill., on the brief), for defendants.

PAGE, Circuit Judge. This is a bill by the Pennsylvania Railroad Company against the Labor Board and its members to enjoin them from functioning as a board generally, and specifically from exercising the asserted right to control the selection of the conferees provided for in Section 301 of the Transportation Act. Two claims are urged: (1) That the act is unconstitutional if, and in so far as, it attempts to impose compulsory arbitration; (2) that the act gives the board no right on ex parte submission, nor on its own motion, to do any act under Section 301.

Defendants move to dismiss the bill and urge: (1) That the Labor Board is an administrative arm of the government over which the courts have no jurisdiction; (2) that the board had the power exercised by it under Decision 119 (Exhibit 2) and 218 (Exhibit 4). Defendant's so-called answer is no more than a statement of grounds urged for dismissal, with the orders and decisions referred to in the bill attached. What the board did is shown in the exhibits filed, and the only authority therefor is found in title III of the Transportation Act.

I. The Transportation Act is entitled: "An act" (a) "to provide for the termination of federal control * * *"; (b) "to provide for the settlement of disputes between carriers and their employees;" (c) "to further amend" the Comerce Act of 1887. 41 Stat. p. 456, approved February 28, 1920. It consists of five titles, viz.: I. Definitions. II. Termination of federal control. III. Disputes between carriers and their employees and subordinate officials. IV. Amendments to Interstate Commerce Act. V. Miscellaneous provisions. Title III creates the Labor Board and other boards, and also covers the subject matter of "disputes between carriers and their employees."

Congress, by the act of June 18, 1910, made very complete provision for suits against the Interstate Commerce Commission (36 Stat. p. 539), yet the language in the act of 1887 (24 Stat. 379), creating the Commission, was quite like the language creating the Labor Board, and the Supreme Court, in 1895, said:

"We think that the language of the statute, in creating the commission, and in providing that it shall be lawful for the commission to apply by petition to the Circuit Court sitting in equity, sufficiently implies the intention of Congress to create a body corporate with legal capacity to be a part plaintiff or defendant in the federal courts." Texas & Pacific Ry. v. I. C. C., 162 U. S. 197, 204, 16 Sup. Ct. 666, 669 (40 L. Ed. 940.)

(1) In my opinion the Labor Board is a body corporate, subject to the jurisdiction of the federal courts, and may sue and be sued. This does not mean, however, that the courts have any general authority over the exercise of a discretion vested in an administrative body or officer. C., B. & Q. R. R. Co. v. McGuire, 219 U. S. 569, 31 Sup. Ct. 259. 55 L. Ed. 328; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. Ed. 1011. L. R. A. 1915C, 1189.

II. The adjustment boards that may be established under Section 302 of title III have not been appointed, so that the powers vested in the Labor Board under Section 303 need not be considered. Sections 301, 307, 308, and 313 have, in the main, been made the subject of attack and discussion. In arriving at the purpose of Congress and the right interpretation of the act, it will be helpful to look briefly at previous legislation, and the conditions that produced such legislation.

In 1887, the regulation of common carriers in their relations to the public, particularly as to rates and service, was inaugurated by the passage of the Interstate Commerce Commission Act (Comp. St. § 8563 et seq.). That act has been extensively amended from time to time, and title IV of the Transportation Act consists wholly of such amendments. At other times, Congress has legislated upon the question of safety appliances and other related matters. In 1888, 1898, and 1913, acts were passed for the appointment of boards of arbitration (25 Stat. 501; 30 Stat. 424; 38 Stat. 103 [Comp. St. §§ 8666-8676]). In none of those acts was there any compulsory submission to arbitration or mediation. Those acts seem to have been produced by conditions in the relations between the carriers and their employees, and were for the purpose of preventing the interruption of business and consequent inconvenience and loss to the public.

The exigencies of the late war made it necessary that the government should take over the operation of the railroads and produced the "Federal Control Act" in 1918 (Comp. St. 1918, Compt. St. Ann. Supp. 1919, §§ 3115¾a-3115¾p). The termination of federal control is provided for in title II of the Transportation Act.

Late in 1916, after a conference for the purpose of adjusting disputes between the carriers and their employees had failed and steps were being taken to call a general strike, the President said to Congress that there were no resources at law at his disposal for compulsory arbitration to prevent commercial disaster, property injury, and the personal suffering of all, not to say starvation, which would be brought to many among the vast body of the people if the strike was not prevented, and

asked for legislation. Congress responded with the Adamson Law (Comp. St. §§ 8680a-8680d). That law has been the subject of wide discussion, and it is not necessary to dwell upon it here, except to note that Congress there provided for an eight-hour day, and made other provisions that resulted in the actual raising of the wages of the employees of carriers. The Supreme Court sustained that act in Wilson v. New, 243 U. S. 332, 37 Sup. Ct. 298, 61 L. Ed. 755, L. R. A. 1917E, 938, Ann. Cas 1918A, 1024. The majority opinion was presented by the Chief Justice. Strong dissenting opinions were written, denying the constitutionality of the act.

[2]. Not only because of the diversity of opinion expressed in the New Case, but because of its wide public discussion, Congress must have had clearly before it the question as to the conditions under which it had the right, if at all, to establish machinery by which to compel the compulsory fixing of wages, rules, etc., as between carriers and their employees. I am of opinion that, when Congress framed and adopted Section 301, it did so with the deliberate intention of imposing, as the plain language of the act indicates, the duty on all carriers and their officers, employees, and agents to exercise every reasonable effort and adopt every available means to avoid any interruption of the business of any carrier growing out of any dispute between the carriers and their employees, and that Congress intended that all such disputes should be considered, and, if possible, decided in conference solely between a carrier and representatives of its employees dirctly interested in the dispute, and that, as hereinafter noted, the only power given to the Labor Board under that section was to hear and decide a dispute which the conferees provided for in Section 301 were unable to decide, and then only in the event that the parties jointly referred the matter to the board.

[3]. The further conclusion is inevitable that the Labor Board was without power to intervene in any way in the proceedings contemplated by Section 301 preceding a reference to it jointly by the parties, except that the board might on its own motion suspend the operation of a decision by the parties if it was of the opinion that such decision as to salaries and wages would make a readjustment of the rates of any carrier necessary, and thereupon as soon as practicable affirm or modify such suspended decision (Section 307b).

[4]. It is, in general way, claimed that the board has the right to direct or control the method of selecting the representatives of the employees under Section 301, under the provisions of Section 308 (4), which is as follows:

"The Labor Board 'may make regulations necessary for the efficient execution of the functions vested in it by this title.'"

The appointment or method of election of conferees under Section 307 was not one of the functions delegated to the board, and therefore it had not the right to make the regulations provided for in Decision No. 218 on pages 8, 9 and 10. I am of opinion that the purpose of Section 301 was to leave to the carrier and its employees ful liberty to get together in their own way. The language of Section 307 strongly supports my conclusion upon Section 301, because Section 307 makes ample provision for intervention on the part of the Labor Board in all cases arising under the act, where the carrier and the employees have failed to compose their difficulties, or upon such failure to join in a submission to the Labor Board, as provided in Section 301. This will more fully appear from the following discussion.

[5]. III. As noted above, no adjustment board has been appointed; therefore Section 307 may be read without consideration of the provisions therein relating to the adjustment board. Such a reading shows that the Labor Board shall receive for hearing, and as soon as practicable and with due diligence decide, any dispute involving grievances, rules or working conditions which is not decided as provided in Section 301, under the following circumstances:

"(1) Upon the application of the chief executive of any carrier or organization of employees or subordinate officials whose members are directly interested in the dispute;

"(2) Upon a written petition signed by not less than 100 unorganized employees or subordinate officials directly interested in the dispute, or,

"(3) Upon the Labor Board's own motion if it is of the opinion that the dispute is likely substantially to interrupt commerce."

The meaning of that language is too plain to need interpretation or construction. Section 307 (b) authorizes the intervention of the Labor Board in precisely the same manner as provided in Section 307 (a) for the purpose of deciding "all disputes with respect to the wages or salaries of employees or subordinate officials of carriers, not decided as provided in Section 301".

In considering the intent of Congress as to the force of the Labor Board's decisions as to other matters than those jointly submitted to them under Section 301, there are two views pressing upon the mind of the Court for consideration:

(1) Do the provisions of the act authorize the Labor Board merely to hear, determine, and publish in an advisory decision that which

in its opinion would be a fair and just wage, or what would be a fair and just solution of disputes involving grievances, rules or working conditions? Or

(2) Does the act authorize the Labor Board to make such findings, and to render such decisions and judgments as will make its determination upon those questions final and binding, so that a rule, determined to be a fair and reasonable rule by the board, shall thereafter be a governing rule between the parties, and so that a wage determined to be a fair and reasonable wage shall thereafter be the wage that shall be paid by the carrier, and that shall be accepted by the employee, and that may be recovered in the courts?

There is no direct provision in the act that decisions by the board shall be final and have the binding force of decrees to be performed. Nor is there any provision that that which is determined to be a just and reasonable wage or rule shall thereafter be the wage or the rule as between the carrier and its employees and upon which either may maintain an action in the courts. There is no provision for the enforcement of the terms of the decisions, nor any penalties for their violation, except the publication provided for in Section 313, if that may be considered a penalty.

All those matters seem to me to indicate that the decisions are only advisory. On the other hand, Section 307 (d) provides that:

"All decisions of the Labor Board * * * shall establish rates of wages and salaries and standards of working conditions which in the opinion of the board are just and reasonable."

Nevertheless I have reached the conclusion that it was the belief of Congress that the results desired by the legislation could be attained through the force of public opinion and that that public opinion would follow the publication made as provided in Sections 307 (c) and 313, and would support the decisions of a board, composed of men each of whom would have special knowledge of the difficulties within and the necessities of the group that he was chosen to represent. I am further of the opinion that, acting upon that belief, Congress provided in Section 307 (d) for a wide and searching investigation, so that the board would have before it all the facts necessary to enable it to reach just and reasonable decisions upon every dispute.

[6]. IV. The remaining—and, of course, fundamental—question in this case is whether or not the act is within the constitutional power of Congress to regulate commerce. In Gibbons v. Ogden, 22 (9 Wheat.) U. S. 1, 188 (6 L. Ed. 23), Chief Justice Marshall said:

"Commerce, undoubtedly, is traffic, but it is something more—it is intercourse. It describes the commercial intercourse between nations, * * * and is regulated by prescribing rules for carrying on that intercourse."

After an extended discussion, the Court further said (9 Wheat. 195, 6 L. Ed, 23):

"We are now arrived at the inquiry—what is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution."

Undoubtedly some character of intercourse by transportation is involved in every completed commercial transaction. Boys trading upon the playground or men trading in the market places make and lay the basis for their transactions by discussion or correspondence, but the commercial transaction must somehow, somewhere, be completed by delivery. It may be the mere passage of the commodity involved in the trade from the pocket of one by hand to the hand of another, or it may be the carrying across the continent of bulky commodities, involving every kind and character of handling and transportation devices, and of men engaged in many kinds of employment; but, whatever be the character of the transaction, whether it is great or small, the instruments of intercourse and transportation are indispensable elements in every commercial transaction.

The commerce dealt with in the act in question involves the main transportation systems both for passengers and freight for the people of the whole United States. It reaches, touches and carries for every city, village and town, and is the instrument by which food, clothing, and fuel, and every other commodity of commerce, is carried for and between the people. There is nothing in existence that could be substituted for it, and it represents the growth of years. If its operation were to be discontinued for even a short space of time, the loss and hardships necessarily consequent thereon would be almost incalculable; and if it were discontinued for any considerable length of time the whole fabric of the nation's commerce and the foundations of our manufactures, which are the basis of the great growth and development of our country and of our business prosperity, would be almost irretrievably wrecked.

Neither bigness nor emergency can bestow or add to the constitutional power to regulate commerce, and I have set out the matters immediately foregoing for the sole purpose of illustrating the large place which the agreements and disagreements between carriers and their employees occupy in the transportation ele-

ment of interstate commerce, and how inadequate must be the regulation, if Congress does not have the power to control such agreements and disagreements. It is of the fundamentals of a common carrier system that it shall be as efficient as the conditions in business will permit, that it shall be continuous, that it shall give equal service to all of the people upon equal terms, and that it shall have fair and reasonable compensation for the services rendered.

I can see no difference in character between those regulatory powers sustained and in operation under the Interstate Commerce Act for more than 40 years and the power to ascertain just and reasonable wages and working conditions as contemplated in title III of the Transportation Act. If the power to regulate commerce is a power to prescribe rules by which commerce is to be governed, then Congress must have the power to prescribe every regulatory or governing measure necessary to keep the commerce of this country alive and the common carriers going concerns. If the common carrier system of this country may lawfully be stopped for one hour by the carrier or by the employees, organized or unorganized, not by reason of any necessity in the business of common carrying, but because either party wills it, or through the disagreement of the parties, then it may be stopped for the same reason, or for no reason at all, for an indefinite time or perpetually, and the constitutional power of Congress would be as impotent and useless as a dead hand upon the ship's rudder in a storm.

In the case of Wilson v. New, 243 U. S. 332, 37 Sup. C) 298, 61 L. Ed. 755, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024, the constitutionality of the Adamson Act was challenged by some of the dissenting justices upon the ground that it violated the Fifth Amendment, first, because an attempt to fix any wage is in violation of the right of private contract; and, second, that the provision in the Adamson Act that only an eight-hour service by an employee should be given for ten hours' pay was in violation of the inhibition in the Constitution against taking property without due process of law. The argument there was that the act, without any investigation on the part of Congress or under its authority as to the conditions of pay and employment in the carrying trade, wrongfully and arbitrarily gave to the employees some $600,000,000 of the carriers' money. The method that was there asserted to have been an arbitrary exercise of power is not present in this case. The act here, on the contrary, makes very careful provision, as hereinbefore shown, for the selection of a well-qualified board, and prescribes a wide field of investigation and a careful consideration of every element involved, to the end that conclusions may and shall be reached by the Labor Board which shall be just and reasonable.

Upon the question of the right to prescribe compulsory arbitration or to fix wages, the majority opinion of the court in the case of Wilson v. New, supra, determines that question, supports the power exercised by Congress, and consequently sustains the constitutionality of the act. There is, and can be, no conflict between the Fifth Amendment and the commerce regulation clause of the Constitution, because, whenever men and property enter into and become a part of an interstate common carrier system, they so far lose their private character that they become wholly subject to all reasonable regulatory measures prescribed by Congress.

Motion to dismiss is denied.

NOTE—*Validity and Construction of Federal Labor Board Act.*—In the case of United States R. R. Labor Board v. Pennsylvania R. R. Co, 282 Fed. 701, decided by the Circuit Court of Appeals, Seventh Circuit, the constitutionality of the Federal Labor Board Act was not passed upon, but there were several questions of construction of the jurisdiction and powers of the board. The Court holds that disputes existing before the enactment of the Transportation Act is cognizable by the Labor Board, if continuing to exist after the board began to function. Either party may take a dispute between carrier and employees to the board. The board may prescribe rules for electing representatives of employees to settle dispute. The board can not be ousted of jurisdiction of a dispute by the railroad company promulgating its own rules relative to the matters in dispute.

BOOK REVIEWS

THE PROBLEM OF PROOF

Mr. Albert S. Osborn, known to our readers as the author of "Questioned Documents", presents us with a new work, entitled "The Problem of Proof", published by Matthew Bender & Co. The full title of the book is "The Problem of Proof as Exemplified in Disputed Document Cases". It is advertised as "a book for active trial attorneys".

There are surprisingly few books on this vital question of proof. This book throughout emphasizes the important idea that actual trials at law, as the experienced practitioner well knows, are contests in which, in large measure, the discovery and proof of the facts, not the interpretation of law, determine the

result of the issue. The two main questions discussed in the work are facts and persuasion, and its title might well have been "Facts and Persuasion in Courts of Law". This is a phase of law practice that at once appeals to the progressive lawyer who realizes the wide variation in the quality of law practice and who is desirous of discovering and utilizing all factors that may contribute to success.

The work discusses in detail every phase of a disputed document case, from its first submission to the end of a trial. There is scarcely any substitute for this book, and while it has grown out of this special field, it contains much matter of general interest to trial attorneys relating to the problem of proving the facts in a court of law. Especially do we commend the work to the young attorney whose aim is to become a trial lawyer. It is of inestimable value to the attorney who must conduct a disputed document case.

There are numerous somewhat unusual chapters in this new work that at once attract attention. Among these are:

"Preparation on the Facts."

"Sifting the Evidence."

"Persuasion and Practical Psychology in Courts of Law."

"That Atmosphere of a Trial."

"Incidental Argument and the Lawyer's Words."

"Off the Record Influences."

"The Specialist as a Witness."

"Cross-Examination from the Standpoint of the Witness."

"Cross-Examination from the Standpoint of the Lawyer."

"The Final Argument."

There is an interesting and instructive introduction by Professor John H. Wigmore, authur of the well-known work on "Evidence". Professor Wigmore tells us that, "In considerable part the book is a report of direct observations of the work of able, as well as of stupid, attorneys in courts of high and low degree in widely separated fields." This ought to be interesting as concrete examples, as well as being in the most practical form. "It is far more than a book of advice on Document Trials; its ripe wisdom ranges over a wide scope of the practitioner's field."

Lack of space forbids the review of this book that we would like to give, but we recommend it to those having need for such a work without hesitation.

One volume, 28 chapters, 548 pages.

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this Digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Assault and Battery**—Arrest.—Where person being arrested did not resist arrest or seek to escape until after he had peaceably asked about the warrant and the nature of the charge and had been rudely told by the officer that he did not have to have any warrant or specify any charge, he had a right thereafter to reasonably resist arrest.—Bourne v. Richardson, Va., 113 S. E. 893.

2. **Attorney and Client**—Disbared—An attorney who commits perjury, whether committed inside or outside of his professional employment, is subject to suspension or disbarment without first having been indicted and convicted.—State v. Woerndle, Ore., 209 Pac. 604.

3. **Automobiles**—Collision.—In action for injuries in collision between automobile and bicycle, evidence that, when a witness passed the bicycle about 1,000 feet from the point of collision, plaintiff and a companion were hanging onto a truck, was admissible to corroborate defendant's testimony that they had hold of the truck just before the accident.—Moreau v. Grandmaison, Mich., 189 N. W. 860.

4.——Contributory Negligence.—In view of ordinance requiring driver of vehicle passing a street car to stop while the car is being loaded or unloaded, and Comp. Laws 1915, § 4817, as to rate of speed of vehicles, where a woman was struck by a taxicab when boarding a street car at a regular stopping place, where there was a safety zone and marker, her contributory negligence in not looking out for the taxicab was for the jury.—Bruman v. Yellow Taxicab Co., Mich., 189 N. W. 887.

5.——Exchange.—Automobile License Law, as amended by Laws 1919, c. 78, and Laws 1921, cc. 81-83, providing (Section 3974) that "upon the transfer of ownership of a vehicle, its registration shall expire", includes both a "transfer" by exchange as well as by sale, and where a transfer of ownership was effected by exchange, the registration expired, even though the automobiles were of the same horse power.—Bleon v. Emery, Utah, 209 Pac. 627.

6.——Leaving Accident.—Though a complaint charging automobile driver with going away, after injuring person, without giving name, residence or automobile number, did not state the name of the person collided with and injured, evidence to show who the injured person was, and that she was struck and knocked down by an automobile operated by defendant, was admissible.—Commonwealth v. Massad, Mass., 136 N. E. 615.

7.——License.—The fact that Automobile License Law, as amended by Laws 1919, c. 78, and Laws 1921, cc. 81, 82, 83, is both a regulatory and a revenue measure, in no way affects its validity.—Bleon v. Emery, Utah, 209 Pac. 627.

8.——Negligence.—Where a child's express wagon was standing on the west side of a road and an automobile on the east side, 50 or 60 feet further south, the driver of a north-bound motor bus, with trailer attached, who was proceeding slowly and carefully, was not negligent in turning out to pass the standing car, when an auto approaching from the north was a sufficient distance from the express wagon to have stopped, if necessary to avoid a collision, especially where there was room to pass by careful driving.—Wiggins v. Poet, Mich., 189 N. W. 849.

9. **Bankruptcy**—Mortgage.—Where a wife advanced money to her husband prior to their marriage out of her own fortune, taking his written obligation to repay it, and after their marriage, but more than four months before bankruptcy, to secure a preference over her husband's other creditors, she took a new note for and a mortgage to secure this debt, the mortgage was valid.—In re Thorsen, U. S. D. C., 282 Fed. 888.

10.——Mortgagor.—Where a bank to which a warehouse receipt had been pledged as security surrendered it and took a trust receipt, if the relation continued that of pledgor and pledgee, rather than mortgagor and mortgagee, the bank could not assert its title as against a trusteee in bankruptcy, armed with rights given by the Bankruptcy Act as amended in 1910, where the receipt gave the debtor an unlimited power of sale, even on credit, and power to manufacture the goods and substitute others of equal value.—In re A. E. Fountain, Inc., U. S. C. C. A., 282 Fed. 816.

11.——Notice.—Trust certificates, covering automobiles purchased by a dealer from the manufacturer on credit, who was in possession, executed to a credit company to secure advances made thereon to the manufacturer, and for which it was liable, not recorded as required of chattel mortgages and conditional sale contracts by the laws of the State, held invalid as against the creditors in bankruptcy of the purchaser.—In re Cullen, U. S. D. C., 282 Fed. 902.

12.——Preference.—Though a bank holding notes for collection was under a moral obligation to see that they were paid, this did not make it a party to the notes, or create the relation of debtor and creditor between it and the makers of the notes, and a transfer to it of other notes, for the purpose of raising money to pay the notes held for collection, was therefore not a preference.—Taylor v. Carraway, U. S. D. C., 282 Fed. 876.

13. **Bills and Notes**—Holder for Value.—Testimony that note sued on was given without consideration for accommodation of payee, and that payee was told to discount it at a certain trust company, and, if this could not be done, to return the note, as the maker did not want it hawked around, and that the payee agreed, was admissible to show what transpired when the note was given, and that the note was without consideration, as it could not be assumed that evidence would not be offered to show plaintiff was not a holder for value.—Levison v. Lavalle, Mass., 136 N. E. 645.

14.——Negotiable.—An instrument designated a "customer's acceptance", specifying that acceptor's obligation "arises out of the purchase of goods from the drawer", held negotiable, though accepted for payment as per Reolo contract for amount and date hereon", since the instrument contained an unconditional promise to pay a sum certain in money, as required by Minesota Negotiable Instruments Law, § 1 (Gen. St. 1913, § 5813) in view of Sections 2, 3 (Sections 5814, 5815).—International Finance Co. v. Northwestern Drug Co., U. S. D. C., 282 Fed. 920.

15.——Possession.—One in possession of negotiable paper indorsed in blank by the payee thereof is prima facie the holder of the legal title thereto.—Parker-McCaskill Furniture Co. v. St. Pasteur, Ga., 113 S. E. 817.

16.——Signature.—A note executed by one "as administratrix" of a certain named estate is the individual undertaking of the party executing the note, and does not bind the estate of which such party is the administratrix The words "as administratrix" are descriptio personae.—Nolin v. Mooty, Ga., 113 S. E. 814.

17. **Brokers**—Agency.—A "real estate broker" is defined to be one who negotiates the sale of real estate, and generally his duty is only to find a purchaser who is ready, willing and able to buy on the owner's terms, and he has no implied authority to fix the terms of sale or to sign a contract of sale in behalf of his principal.—Crews v. Sullivan, Va., 113 S. E. 865.

18.——Collector.—A person employed to collect payment on an agreement which has already been negotiated is not a real estate broker or real estate salesman within St. 1921, p. 1294, and any misconduct in performing such acts does not warrant the real estate commissioner in revoking the license of such person.—Schomig v. Keiser, Calif., 209 Pac. 550.

19. **Carriers of Passengers**—Ordinary Care.—Carrier operating sleeping car was liable for damages, caused when drunken male passenger in a nude or partially nude condition fell or climbed into the berth of a female passenger, only if it knew, or in the exercise of reasonable care could have ascertained, the intoxicated condition of such passenger, and in the exercise of ordinary care could have anticipated that he would probably insult or injure the female passenger.—Tomme v. Pullman Co., Ala., 93 So. 462.

20. **Chattel Mortgages**—Manufacturer.—Under Civ. Code, § 2955, excepting from goods which may be subjected to mortgage the stock in trade of a merchant, a mortgage on canned goods of a company engaged in the business of buying and canning of raw fruits and vegetables contained in a storeroom where its finished products were kept awaiting purchasers was valid, the company being a manufacturer as distinguished from a merchant, giving those words their ordinary meaning in absence of statutory definition; as one who simply manufactures an article and sells it is not a merchant, and, though a manufacturer may also be a merchant if he buys and sells goods, he does not become one by disposing of the goods he has produced at a manufacturer's profit.—Phillips v. Byers, Calif., 209 Pac. 557.

21. **Commerce**—Interstate.—A foreign corporation, maintaining an agent within the State and shipping pig iron from a point without the State to a point within the State pursuant to a contract, was engaged in interstate commerce", and was not doing "business within the State" in violation of Comp. Laws 1915, § 9063 et seq.—Toledo Furnace Co. v. Lansing Co., Mich., 189 N. W. 864.

22.——Money.—Money is not an article of commerce, but merely a medium of exchange.—Republic Acceptance Corporation v. Bennett, Mich., 189 N. W. 901.

23.——Sea Planes.—In so far as seaplanes are used in interstate commerce, it is not within the power of the State Legislature to limit their activities; that being within the exclusive jurisdiction of Congress.—People v. Smith, N. Y., 196 N. Y. S. 241.

24. **Constitutional Law**—Class Legislation.—Pub. Acts 1919, No. 384, providing for regulation and supervisory control of installation merely of warm-air heating plants inclosed in metal with more than one pipe, is class legislation; no reason therefor not equally applicable to other plants appearing.—Peninsular Stove Co. v. Burton, Mich., 189 N. W. 880.

25.——Corporate Purpose.—An issue of bonds by a city, and levy of taxes to pay them, to construct a transmission line to connect with the municipal power plant of another city, are for a strictly corporate purpose, and an ordinance authorizing such an issue does not contravene Const. U. S. Amend. 14, § 1.—Carr v. City of Athens, Ill., 136 N. E. 633.

26.——Eminent Domain.—Conservation Law, Art. 7-A, as added by Laws 1915, c. 662, providing for the organization of river regulating districts to regulate the flow of water in rivers and prevent floods by means of storage reservoirs, is valid, and does not violate Const. Art. 1, § 6, providing that no person shall be deprived of property without due process of law, or Section 7, relative to the

ascertainment of compensation for private property taken for public use.—Board of Black River Regulating Dist. v. Ogsbury, N. Y., 196, N. Y. S. 281.

27.——Supreme Courts.—While the Legislature may regulate procedure in the lower courts, it cannot interfere with the regulations of the Supreme Court as to the procedure therein, which includes the time within which an appeal must be docketed. —State v. Ward, N. C., 113 S. E. 775

28.——Tax.—The income tax imposed by St. Mass. 1916, c. 269, § 5(b), is a general tax, and the proceeds thereof are a part of the general funds of the State, and their expenditure for educational purposes does not impose a public charge on a special class of property and persons not specially benefited, thereby taking property without due process of law, in violation of Const. U. S. Amend. 14.—Knights v. Jackson, U. S. S. C., 43 Sup. Ct. 1.

29. **Contracts** — Consideration.—Where persons petitioning that a road be laid out as a public way conveyed land to the city for the purpose of widening the road, an agreement in the conveyance to pay any assessments for betterments that might be levied was not an attempt to oust the courts of jurisdiction, but lawful, and made on a valid consideration.—Estes v. City of Newton, Mass., 136 N. E. 643.

30. **Corporations**—Agency.—Where indorser purported to act as agent of payee company in making the indorsement, a letter in which this company's treasurer stated that the purported agent had authority to make the indorsement was not sufficient to prove such authority, under Rev. Code 1919, § 1723, providing that the signature of any person may be made by an agent duly authorized in writing.—State Bank of Alcester v. Weeks, S. Dak., 189 N. W. 941.

31.——Stock Issue.—An unsecured note is not property within the meaning of the law governing the issuance of stock, the issuance being prohibited except for money received, labor performed, or property actually received.—Western Nat. Bank v. Spencer, Tex., 244 S. W. 123.

32. **Covenants**—Restrictions.—Where 18 blocks of lots had been sold, and the deed to each lot restricted its use to a single dwelling house, to cost not less than a stated amount, and these restrictions had been substantially complied with, the fact that the character of the surrounding property had changed and was now used for business purposes did not invalidate the restrictions.—Bohm v. Silberstein, Mich., 189 N. W. 899.

33. **Damages**—Physical Injury.—The foetus of a pregnant woman being part of her person, she is entitled to recover for any actual physical injury sustained by such foetus, including mental pain and suffering proximately resulting therefrom, where, as a result of an injury to such foetus, the child is born deformed, the mother is entitled to recover damages, not only for the physical injury, but also for her mental suffering on account of the mortification and disappointment at the birth of a deformed child. The pain and suffering to the mother thus caused may be continued throughout her entire life, and therefore be permanent, and in computing damages for such injury the permanency of such pain and suffering may be considered. The mother, however, cannot recover damages for any mental suffering which she may undergo occasioned by the child's deformed condition continuing after birth, nor for any pain and suffering which the child may undergo.—Davis v. Murray, Ga., 113 S. E. 827.

34. **Electricity** — Public Service Corporation.—Electric power company, which had developed the water power of the State and for such purpose had been given and had used the power of eminent domain, and which had undertaken to transmit electric current to independent vendors thereof under the authority of its charter, did not have the right to pick and choose its customers, and to arbitrarily discriminate among them, but was required to treat all alike; such corporation constituting a public service corporation.—North Carolina Public Service Co. v. Southern P. Co., U. S. C. C. A., 282 Fed. 837.

35. **Eminent Domain**—Squatters.—Where defendants in condemnation proceedings claimed that the proceedings affected their rights in a certain Section 16 and in the waters of a non-navigable river as it flowed through the section, and it appeared that the section was a school section, title to which the State had never parted with, and that defendants had posted and filed notices of appropriation of the river waters and had done some development work on the river, held, that defendants were mere squatters.—City of Tacoma v. Mason County Power Co., Wash., 209 Pac. 528.

36. **Execution**—Fraudulent Conveyance.—An action to set aside a fraudulent conveyance, so that the property may be subjected to the execution of a judgment more than 20 years old, is not a proceeding, under Burns' Ann. St. 1914, § 717, providing that execution on a judgment over 10 years old may be had only upon motion after 10 days' notice to the adverse party, and a showing that it has not been paid.—Pensinger v. Jarecki Mgf. Co., Ind., 136 N. E. 641.

37. **Executors and Administrators** — Agency.—Where an administrator employs another to bid in lands of an intestate at a sale conducted by him as such administrator, such agent being instructed by the administrator not to exceed a named price per acre, but through a misunderstanding of his instructions such agent bids off the lands at a higher price per acre, the mistake of the agent will be imputed to his principal, and will not furnish a ground for setting aside the sale on the ground of mistake.—Arnold v. Arnold, Ga., 113 S. E. 798.

38. **Fixtures**—Pumps.—Under Rev. St. 1911, Art. 5628, as to mechanics' liens, where seller of pumps to oil refinery filed materialman's lien therefor, and such pumps were removable from their concrete base on the refinery's premises without injury to the freehold beyond the value of the pumps themselves, such pumps were not fixtures at the time of the purchase of the premises of the oil refinery under foreclosure of a prior vendor's lien and deed of trust lien, and the materialman's lien on the pumps was superior to such prior existing liens.—Mogul Producing & Refining Co. v. Southern Engine & P. Co., Tex., 244 S. W. 212.

39. **Fraud**—Sales.—False representations by one selling steel for shipment at its convenience, that delivery could not be made, except from time to time during the three months following the making of the contract, when in fact shipment of the entire order was made within six days, did not damage the buyer, where under its contract it would not have been entitled to any fall in price before delivery.—Etna Forge & Bolt Co. v. Youngstown Sheet & Tube Co., U. S. C. C. A., 282 Fed. 786.

40. **Frauds, Statute of**—Acceptance.—Where two distinct and separate orders for goods were given to plaintiff on behalf of defendant on the same day, the acceptance of part of the goods under one order did not bring the other order within Comp. Laws 1915, § 11835, subd. 1, authorizing suit on an oral contract of sale provided buyer accepts part of the goods.—S. L. Munson Co. v. De Vries, Mich., 189 N. W. 859.

41. **Fraudulent Conveyances**—Bulk Sales.—Where a firm, pursuant to an agreement, consigned a large part of its merchandise to consignee, and the latter made an advancement, secured by a lien on the merchandise, sold the merchandise at auction, and returned the proceeds, less the advancement and 15 per cent commission, there was no violation of the Wisconsin Bulk Sales Act (St. 1921, § 2317c), where, although it appeared that the auction sale was not according to consignor's usual course of business, it did not appear that the aution was in bulk, for the consignment did not violate the act, as there was no sale until consignee disposed of the goods at auction as agent of consignor.—Goetz v. Michael Tauber & Co., U. S. C. C. A., 282 Fed. 869.

42. **Highways**—Flood Waters.—Where a county constructs a levee on a public highway which merely obstructs the flow of overflow flood waters and returns them to the channel of a stream earlier than they would if not diverted, which causes a greater overflow on a property owner not contiguous to the highway the county is not liable in damages for so doing. Indian Creek Drainage District v. Garrott, 123 Miss., 319, 85 South. 312, cited.—Herring v. Lee County, Miss., 93 So. 436.

43. **Husband and Wife**—Agency.—The marital relation alone is not enough to show a husband's agency for the wife in contracting for repairs on property owned by them as tenants in common.—Lonnqvist v. Lammi, Mas., 136 N. E. 610.

44.——Promissory Note.—The community, while not liable upon an obligation purely of suretyship and not benefiting the community, is obligated upon the husband's promissory note, where the consideration wholly or partially benefits the community.—Lincoln Trust Co. v. Spangler, Wash., 209 Pac. 521.

45. **Insurance**—Agency.—Where insurer authorized bank to collect assessments, and insured directed the bank to deduct the amount of the assessments each month from his account, and bank failed to make payment, although insured's balance was sufficient to meet the assessment, the policy did not lapse for non-payment.—Stark v. Illinois Bankers' Life Assn., Mich., 189 N. W. 862.

46.——Application.—As respects the question of falsity of a representation by an applicant for life insurance that he was a night watchman, his occupation as night watchman continued, though he temporarily ceased to perform the duties of the position and engaged in other forms of employment, if he had not finally given up or been discharged from his customary employment as night watchman.—De Guzzi v. Prudential Ins. Co. of America, Mass., 136 N. E. 617.

47.——Delivery.—The deposit by the insurer in the mails of a policy of life insurance directed to the local agent of the insurer for delivery to the insured, upon which the premium has been paid to and accepted by the insurer, amounts to an acceptance by the insurer of the application for insurance and a delivery of the policy to the insured, and therefore to the creation of a binding contract of insurance between the insurer and the insured. Where such policy provides that it shall not take effect unless the insured is alive and in good health at the time of its delivery, and does not provide for an actual delivery, the insurer's liability under the contract is not defeated when the insured was, at the time of the delivery of the policy to him by its deposit in the mails, alive and in good health, although the insured died the next day, and before the policy was received by the local agent for the purpose of delivery.—Reserve Loan Life Ins. Co. v. Phillips, Ga., 113 S. E. 815.

48.—— Misrepresentations. — Under Shannon's Code, § 3306, misrepresentations by the insured that he did not use intoxicating liquors constituted ground for cancellation of the policy, where it was established insured was an habitual user of intoxicating liquors.—Volunteer State Life Ins. Co. v. Richardson, Tenn., 244 S. W. 44.

49.——Representations.—Where burglary policy provided that it should be void "if there is any fraud or misrepresentation or concealment concerning this insurance or any claim hereunder", a false statement in application that insured had never sustained loss by burglary, nor claimed indemnity for such loss, held a representation and not a warranty.—Lieberman v. American Bonding & Casualty Co., Mo., 244 S. W. 102.

50——Warranties.—A clear violation by insured of the "iron safe" and "record warranty" clauses of her policies, through inexperience, though not fraudulent, carries with it its own consequences, which the courts have no power to alter.—Commonwealth Underwriters' Agency v. Lawrence G. Co., Tex., 244 S. W. 200.

51. **Internal Revenue**—Charitable Trusts.—Under Income Tax Law, Sept. 8, 1916, § 2b (Comp. St. § 6336b), relative to income from property held in trust, and Section 11a (Comp. St. § 6336k), exempting charitable corporations, where property was devised to a hospital subject to the payment of certain annuities, and the trustee loaned the property to the hospital, taking security for the payment of sufficient interest to satisfy the administrative charges and the last remaining annuity, the hospital's income therefrom is not taxable.—Lederer v. Stockton, U. S. S. C., 43 Sup. Ct. 5.

52. **Intoxicating Liquors**—Agency.—Laws 1917, p. 60, § 17h, making it unlawful for any person to open up, conduct, or maintain a place for selling liquor, whether as principal or agent, implies some control or management over the place.—State v. Bussi, Wash., 209 Pac. 523.

53.——Property Right.—Relative to application of any rule of law that property illegally taken and in possession of public officers will be ordered returned, and not admitted in evidence, when application is made before trial, by express provisoin of Laws 1919, p. 467, § 7, there are no property rights in intoxicating liquors kept for violation of the act.—Pasch v. People, Colo., 209 Pac. 639.

54.——Search Warrant.—A warrant for the search, for intoxicating liquor, of premises described as the premises of B., and situated at the corner of Eighth and W. streets in a certain city, without any statement of who owned or occupied the premises or that they were occupied at all, did not sufficiently describe the place to be searched to satisfy Code Cr. Proc. §§ 793, 797, and Section 802-b, as added by Laws 1921, c. 156, and did not authorize a search of B.'s house at the corner of Eighth and L. streets 600 feet from the corner described in the warrant.—In re Graham, N. Y., 196 N. Y. S., 276.

55.——Transportation.—Where defendant, at the solicitation of a friend, got in an automobile for a ride and then found that his friend had been drinking and decided to take him home as soon as he could get him to go, and seeing a bottle of liquor on the seat put it in his pocket during the ride, defendant did not violate an ordinance which was substantially in the words of Crawford & Moses' Dig. § 6165, prohibiting the transportation of alcoholic liquors, the word "transport" meaning to carry or convey from one place to another.—Locke v. City of Ft. Smith, Ark., 244 S. W. 11.

56. **Joint-Stock Companies and Business Trusts**—Partnership.—Where the articles of an unincorporated trust association authorized the stockholders to elect trustees, fill vacancies, and the like, a partnership existed, every member of which was liable for the debts of the concern, which might be sued by name and service on certain officers under Rev. St. tit. 102, c. 2, and judgment taken against it under Rev. St. Art. 2006.—West Side Oil Co. v. McDorman, Tex., 244 S. W. 167.

57. **Landlord and Tenant**—Lease.—The vendor, and not the vendee of lease containing covenant not to assign without lessor's consent, is bound to obtain the landlord's consent to its assignment, as regards right of vendee to recover the amount paid to the vendor.—Greene v. Barrett, Nephews & Co., N. Y., 196 N. Y. S. 244.

58.——Negligence.—Where a 7-year old boy was injured by falling from a third-story window, in an apartment rented by his parents from defendant, because of defective screen which defendant had promised to repair, the negligence of the parents, if any, would not affect the child's right of recovery, the negligence of defendant being continuing.—Ross v. Haner, Tex., 244 S. W. 231.

59. **Licenses**—Restaurants.—Cities and Villages Act, art. 5, authorizing cities, under Section 1, cl. 41, to license "keepers of ordinaries", under Clause 50 to regulate the sale of meats, poultry, etc., under Clause 53 to regulate the inspection of meats, poultry, and other provisions, and under Clause 91 to license "coffee houses", held not to empower the city to require a license to conduct a restaurant business.—Potson v. City of Chicago, Ill., 136 N. E. 594.

60. **Mandamus**—Interstate Commerce Commission.—Where the Interstate Commerce Commission did not dismiss a complaint seeking reparation and an order that carriers perform the duty of loading paper stock for lack of jurisdiction, but because it held that the petitioners were not entitled to relief, mandamus sought for the purpose of compelling a decision in petitioners' favor was erroneously granted, as mandamus cannot be had to compel a particular exercise of judgment or discretion, or be used as a writ of error.—Interstate Commerce Commision v. United States, U. S. S. C., 43 Sup. Ct. 6.

Index-Digest

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Subject-Index

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This subject-index contains a reference under its appropriate head to every digest of current opinions which has appeared in the volume. The references, of course, are to the pages upon which the digest may be found. There are no cross-references, but each digest is indexed herein under that head for which it would most naturally occur to a searcher to look. It will be understood that the page to which reference, by number, is made, may contain more than one case on the subject under examination, and therefore the entire page in each instance will necessarily have to be scanned in order to make effective and thorough search.